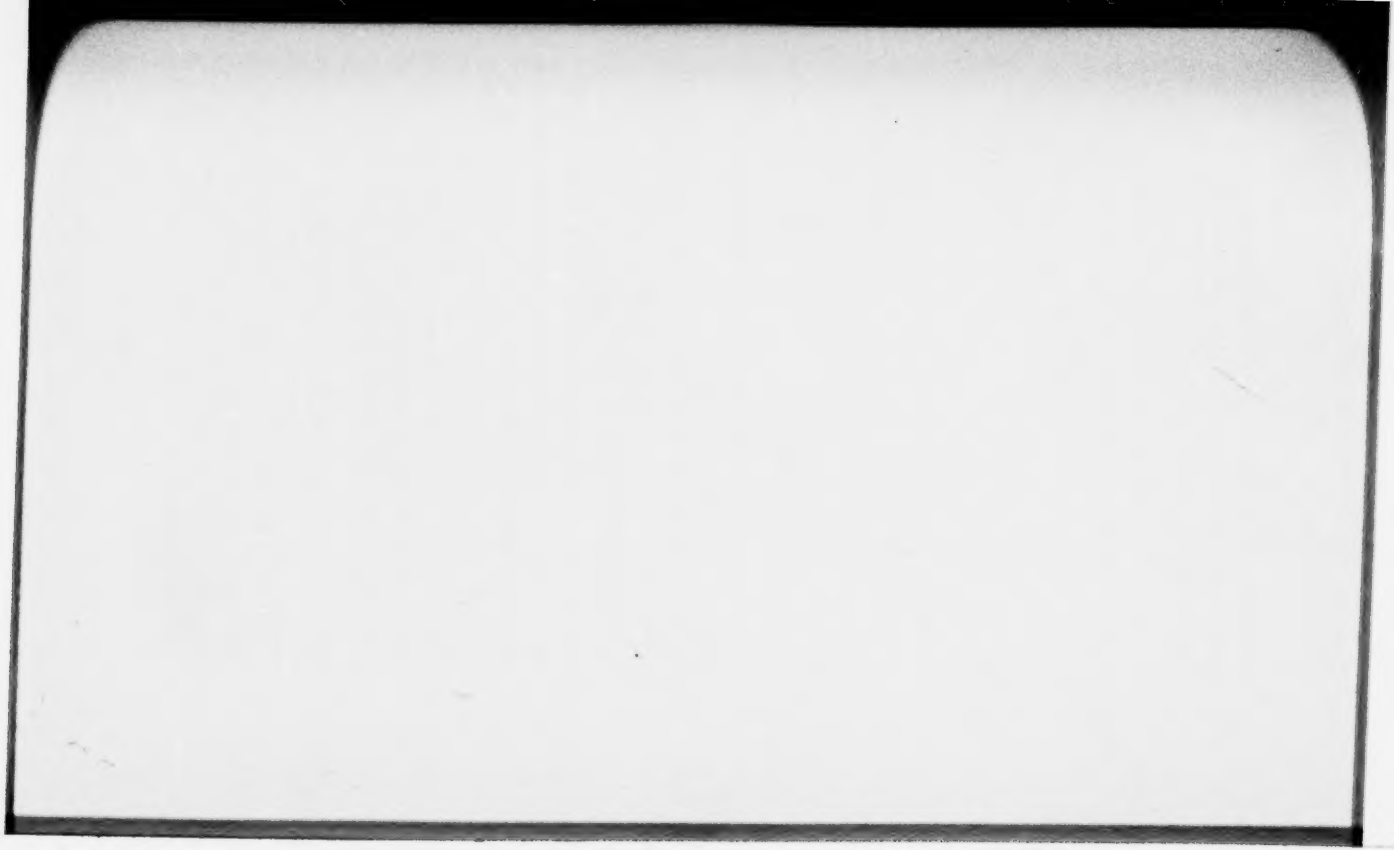

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Reply Brf. of Dent for P. E.

Filed Jan. 27, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 268.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY,
PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Illinois.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

THOMAS DENT,
FOR PLAINTIFFS IN ERROR.

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In Error to the Supreme Court of the State of Illinois.

Reply Brief for Plaintiffs in Error.

I.

WHAT IS TO BE REVIEWED? WHAT INQUIRY DOES THE WRIT OF ERROR PRESENT?

The brief for the defendant in error suggests, presumably in a Pickwickian sense, that the subject to be reviewed is "the judgment of the Supreme Court of Illinois rendered in *Hardin* v. *Shedd,* 177 Ill., 123."

It should have been said the writ of error is applicable to the case as a whole, and therefore brings into question, as particularly, the earlier decision of the same court, as reported under the title of *Fuller* v. *Shedd,* 161 Ill., 462, and especially involves, also, the decree rendered by the Circuit Court of Cook County on the 11th of August, 1897, after the case, as first reported in the Supreme Court of the state, being reversed in part, was remanded to the lower court for further proceedings.

This matter was clearly stated in the petition for the writ of error. (Rec., 1, 2.)

The writ acts on the record, removing the same to this tribunal for review. It is a continuation of the original litigation, rather than the commencement of a new action.

Nations v. *Johnson*, 24 How., 195 (16 Law. Ed., 628).

Why the learned counsel should refer to this writ of error as having reference only to the last report of the case in the Supreme Court of the state is not clear. But, indeed, from later suggestions in his brief it appears that he apprehended the nature of the inquiry as involving, as above stated, the correctness of the decree which the Supreme Court of the state finally affirmed.

Of course, if the matter stood upon the decree which was first rendered, conforming, as that decree was at least intended to conform, to the decision of this court in *Hardin* v. *Jordan*, 140 U. S., 371, the present writ of error would not have been sued out; for the decision of the court was not then adverse to the claim set up by the present plaintiffs in error as existing in their behalf under the land patents through which their title inured. But when the Supreme Court of the state in the case as reported in 161 Ill., 462, denied the right or title set up by the plaintiffs in error to the submerged lands, it was only necessary to await a final decree and the consideration thereof upon the appeal reported in 177 Ill., 123, to bring the case here by writ of error for review.

II.

HOW WAS THE QUESTION BY REASON OF WHICH THE CASE IS REVIEWABLE IN THIS COURT UNDER § 709 OF REVISED STATUTES UNITED STATES PRESENTED?

That there was such a question in the state court, and that it was passed upon there, both by the trial court, sitting as a court of equity, and by the Supreme Court of the state sitting in review, is clearly evident from the record. The fact, as the learned counsel himself suggests, appears from a certificate of the Chief Justice of the latter court; which certificate, it may be added, was signed with the approval by "O. K." of the learned counsel. (Rec., 2, 3.)

The certificate would have in its favor, independently of such approval, the presumption suggested in *Armstrong* v. *Treasurer of Athens County,* 16 Pet., 281, 286, where the propriety of such certificate was sanctioned.

The counsel quotes at pages 3 and 4 of his brief a part of one of the pleadings of plaintiff in error Gertrude H. Hardin, showing that by virtue of the patents from the United States under the survey of 1834-5 she claimed not only the specified area or acreage of the patented tracts, bordering on a non-navigable lake, but also ownership to the center of the lake. This claim was made in the state court with ample fullness. (Rec., 30-32, 42-3, 46-7.)

It was distinctly averred, among other things, that the lake bed passed to the patentees from the United States (Rec., 42), and therefore to Mrs. Hardin, the party so claiming.

The other plaintiff in error also claimed on the same theory to the center of the lake. (Rec., 48.)

This claim was recognized by the decree first rendered; but the Supreme Court of the state decided against it. (Rec., 481.)

Mr. Justice PHILLIPS, speaking for the court, said in the opinion in 161 Ill.:

> "We are asked to * * * hold the grant (from the United States) to the riparian owner conveys the bed of a non-navigable lake. * * * We decline to do so." (*Ib.*)

Earlier in the opinion it was said:

> "The main question presented on the pleadings and facts appearing in this record is, whether the title of the riparian owner on a lake meandered in the original survey by officers employed by the United States for surveying public lands, extends to the center of the lake or stops at the water's edge." (Rec., 466.)

The defendant in error claimed the submerged lands by certain definite descriptions as tracts, as well as the lands patented which originally were on the border of the lake; and that claim, not only as to himself, but also as to the plaintiffs in error, was recognized by the decree first rendered. But on assignment of errors by contestants for the title to the lake bed (Rec., 466) a reversal of the decree in that regard was adjudged, and the case was remanded to the court of original jurisdiction for further proceedings.

It became necessary, therefore, as has heretofore been said, that such further proceedings should be had, and that the case should again go, as it did go, to the Supreme Court before the judgment could be said to be final in the sense of being subject to review here.

In almost every conceivable form the claim of title to the submerged lands or lake bed, under the certificates of entry and the patents, was made, not only in the Circuit Court, but also in the higher court, as distinctly as such claim was made in *Hardin* v. *Jordan, supra*, and *Mitchell* v. *Smale*, 140 U. S., 406, and even more distinctly.

The learned counsel questions, seemingly, whether some special statute might not have been cited to make it clearer what was the claim. But to what useful purpose could any further citation have been made?

The fact that the defendant in error claimed, though in a less distinct form of averment, title through the patents to De Witt and Douglas, respectively, to distinct parts of the lake or lake bed, does not militate against the propriety of the present writ of error. Both parties could well claim such right, and upon its denial by final decree, to one or both, the right to review, on the part of the party aggrieved, arose. This principle was declared or reaffirmed in *Buel* v. *Van Ness*, 8 Wheat., *312, *324 (5 Law. Ed., 624, 627).

As stated above, a distinct claim of title under authority of the United States, as resulting from its sale and conveyance, on which the plaintiffs in error relied as entitling them to hold not only to the edge of the waters of the lake, but to its center, was made by the pleadings, and this was sufficient.

Armstrong v. *Treasurer of Athens Co., supra.*

It was there, as again in *Medberry* v. *Ohio*, 24 How., 413, held that this court may ascertain from the pleadings whether "one of the questions which this court has jurisdiction to examine and review was actually decided by the state court."

It should be remarked, also, that the final decree, while it declared that the purpose of the meander of the lake "was to ascertain the quantity of upland to be charged for," and "not to limit the respective grants to the meander" (Rec., 439), yet did declare, in opposition to the claim made in the pleadings, that when the survey was made by the United States, and when the United States sold and issued patents for the several tracts claimed by the parties to the present record, the submerged land of the lake or lakes, with the waters thereof, was held and controlled by the State of Illinois. (Rec., 439, 440.)

This was a denial of the right which had been set up in the pleadings as aforesaid, a denial which the trial court entered, under the direction, as it supposed, of the Supreme Court of the state, which had refused to affirm the former decree, by which such right had been sanctioned. The denial is embodied in the decree itself, which the court may notice with reference to this question. *Armstrong* v. *Treasurer of Athens Co., supra.*

III.

The learned counsel suggests that the local law of the state governs the construction to be given grants of land bordering upon waters, whether navigable or non-navigable. BUT HE DOES NOT ANSWER THE POINT THAT THE CONSTRUCTION OF A GRANT BY THE GOVERNMENT AS PRIMARY OWNER IN RESPECT TO LANDS EMBRACING NON-NAVIGABLE WATERS, IS A MATTER TO BE DETERMINED BY THE COMMON LAW; NOT BY THE VOLITION OF A STATE COURT, NOR INDEPENDENTLY OF THE VIEWS OF THIS COURT IN SUCH CASES.

The cases cited by the counsel are cases of navigable waters; not cases involving title to submerged lands in non-navigable waters. The lands submerged by small non-navigable lakes and non-navigable streams alike were, as on argument here will be seen, subject to be surveyed and sold by the United States; and therefore they could not be held to belong to the state in the absence of specific grant. All the cases cited in *St. Anthony's Falls Water Power Co.* v. *Board of Water Commissioners,* 168 U. S., 349, like that case, itself, involved questions as to riparian rights in or connected with navigable waters, wherein the states admittedly had rights of sovereignty, permitted to them by acts of Congress as construed by this court.

The cases do not any of them support the advanced position of counsel (page 28 of his brief), that the state took title to this non-navigable lake "by virtue of its sovereignty."

Again, the question of navigability was one of fact, not to be decided by choice or dictum; and when a stream or body of water is to be placed in that class the grounds for so placing it must be shown.

The counsel suggests in the same connection "that by the sale and patenting of the lands to private parties the government abandoned all its title and yielded the lands wholly to the sovereignty of the state." (*Ib.*)

That is certainly a novel theory. What show of authority can there be for such a proposition, or for supposing, for example, that as the United States sold one tract after another bounded by the lake, it would by its grant pass the title to the submerged land to the state? That would be a strange construction of a patent. In name the patent ran to an individual. The construction

asked by the learned counsel is, that the patent be held to operate in favor of or run to the state as well.

However, the learned counsel added, "It (the supposed proprietary right of the state to this non-navigable lake) is the same character of title as was held to exist in the State of Illinois in the bed of Lake Michigan in *Ill. Central Ry. Co.* v. *People,* 146 U. S., 387."

When analyzed, the argument of counsel would seem to be that this non-navigable lake is to be placed in the category of navigable waters to give the state sovereignty over it.

What show of reason is there for holding that the title to the beds of non-navigable lakes within the North-west territory was held by the United States in trust for the future states, the same as the bed of Lake Michigan, or a like inland sea, was held?

There is something akin to confusion of thought in deducing from the right of the state to exercise police powers the claim of a proprietary right in non-navigable waters, as a foundation for the exercise of such powers. The learned counsel realizes that there is a distinction between a title coming by grant and one connected with sovereignty on the part of the state upon its admission into the union on an equality with the other states of the union; but he would obliterate the distinction in this case, because of a fiat of the Supreme Court of the state enforcing a former dictum of the same court.

IV.

Reference has been made herein to the statement in the decree as to the purpose or object of the meander.

Is it possible from the finding of the court in that regard to discover any support for the theory that because the lake was meandered the title to the submerged land therein passed to the state? The finding itself negatives the suggestion, and lays bare the suggestion of the argument of inconvenience of division as the reason, forsooth, for the claim for the state made by its highest court, assuming to decide absolutely how a government grant should be construed.

Why, if such claim was to be made, was it not made before the passage of the swamp land grant, or in the controversy in the land office over the survey of 1874 and the pre-emptions allowed because of that survey? Or why, again, was it not made before the submerged lands were taxed? Why did not such claim emerge until the court advanced it as the reason for reversing the decree first rendered in this case?

V.

Some observations of the learned counsel might imply that there was a finding that Hyde Lake was originally a separate body of water. The record does not so show. Nor, indeed, does the argument of counsel go so far. He merely maintains that it had become "such land" (meaning lake, probably) prior to this suit. (P. 41 of the brief of counsel.)

But it is to be noted that if there were two lakes, there was but a single meander, running around both of them, and no meander of them as separate bodies, and the main theory of the state court, as advanced in the opinion by Mr. Justice Phillips, for claiming title in the state, to wit: that he was dealing with a meandered lake, would fall.

VI.

AS TO SKETCHES OR DRAWINGS SHOWN IN THE BRIEF OF THE LEARNED COUNSEL.

All are in the main conjectural or intended to illustrate theories, Nos. 1, 2 and 3, for example, to enforce the idea that there were tongues of land having a tendency to separate the lake into two bodies; an intervening low or marshy place becoming dry land in the course of time, and thus completing the separation, and thus also adding, under the accretion theory, to the lands of the defendant in error in the various directions in which the water receded from such elevations or from the original shore lines of the DeWitt and Douglas tracts.

Of such drawings, it is also to be said that they do not follow the supposed findings relied upon by counsel as appearing from the opinion in *Fuller* v. *Shedd*.

For example, the islands mentioned in the opinion by Mr. Justice Phillips as "islets" or "islands, one a mere knoll" (Rec., 464), do not appear in the sketches; though the findings in the decree (Rec., 447) passed such islands bodily to the defendant in error, on the principle that as they were in the lake, and supposed to be in front of his land, the patent carried them along with the tracts on the shore of the lake. As to such islands, see Shedd's Ex-

hibit Map C (Rec., 91), showing elevations appearing like islands with water at datum, the stage represented by said map.

Sketch or Map No. 4, given by counsel (p. 45 of Mr. Mecartney's brief) is made the basis of some criticisms upon the apportionment by the first decree, the decree which was reversed by the Supreme Court of the state. But the sketch does not represent the findings under that decree. For example, the sketch extends the supposed ridge much further south than the decree allowed. It does not illustrate at all the attenuated or narrow, and in some places thread-like form of the supposed ridge, characteristics appearing from the evidence. The same remarks apply to all the other drawings given in the brief of counsel. They are not in conformity with the evidence as to the natural depressions.

The observation of the learned counsel at page 46 of his brief that "In sketches 4 to 7 the green denotes land awarded to Mr. Shedd, the pink shows that awarded to Mrs. Hardin," would undoubtedly be admitted by the counsel to be inaccurate if he were to weigh the import of the observation. Sketch 4 comes more nearly than do the other sketches to representing the reversed decree. The other sketches do not compare with either decree. Map No. 8 in the brief of plaintiffs in error (p. 176 of brief), shows Wolf Lake and Hyde Lake, both conjecturally, or as per "Jordan's Map D," and illustrates the final decree as between the parties to this record, excepting that the strip of land belonging to the Cook County Canal and Dock Company is included with other tracts, and is not separately shown.

An observation of the learned counsel as to his Sketch

No. 7 (see p. 54 of his brief), could not have been well considered. He speaks of the sketch as "showing a proper apportionment in a lake or lakes of a shape similar to Wolf and Hyde Lake upon the basis of private ownership of the bed."

Why should he say lakes in that connection? Why should he not look to the official plat, by which all parties were governed in buying? Why, from owning two small fractions of 4.53 and 7.37 acres, respectively, should he take nearly a half of the body recently called Hyde Lake and almost half of what is still known as Wolf Lake? Why should he deprive us of rights as part owner of the Egan tract? What basis is there for such side lines as the sketch represents?

The sketch would cut off the shore tracts of the plaintiffs in error from the present Wolf Lake, and take no account of "the natural depression," by reason of which there was originally but one lake. The theory of the learned counsel, under this sketch, would give his client the residue of Wolf Lake, or the most of it; not only the part in green, but the part in buff.

The sketches given in Mr. Mecartney's brief as Nos. 5 and 6 favor, measurably, extension of our west shore tracts, or rather one of them, by converging side-lines, to Wolf Lake; but all are to support theories in respect to accretions; and as a division on any such basis is legally inadmissible, because no title in the state has in any way been shown, further examination of those sketches is dismissed.

VII.

MISCELLANEOUS POINTS.

It is not understood, as counsel supposes, page 32 of his brief, that either of the plaintiffs in error produced or put in evidence the statement preceding the opinion in *Fuller* v. *Shedd*. The statement (161 Ill., 463, 470), is supposed to have been prepared, as usual, by the judge who delivered the opinion; and where the statement and opinion differed, one might to some extent explain or correct the other. In this sense all went together in the Circuit Court; and while it is true that his Honor Judge Tuley regarded the one or the other or both as equivalent to findings of facts, by which he felt bound to be guided, yet, after all, there are no findings that are binding here. The evidence is open to investigation.

Of course, it was to be expected, when the case was heard a second time, that the present plaintiffs in error were bound by the decision of the higher court until it should be reversed, yet that they were entitled to due protection until a hearing in another tribunal, free to examine the whole case, could be invoked.

A reflection upon Mr. Isaac N. Hardin as a witness supposed to have repeated industriously the term "Elm Island" in Mr. Mecartney's brief (p. 48) does not seem to be borne out by the record. The first use of the term, in point of time as to this record, seems to have been by William Gardner, a witness who testified by deposition for Mr. Shedd. (Rec., 375.) In testifying at the hearing Mr. Shedd himself, on direct examination, referred to that elevation. (Rec., 73.) Instances of the use of the

same descriptive phrase, but not by Mr. Hardin, occurred in the evidence of sundry witnesses. (Rec., 279, 322.) Mr. Hardin referred to this elevation as "Field's Place" or "Fogli's House." (Rec., 352-7.) He, however, spoke (Rec., 353) of "the wooded elevation south of Smale's Point" as being an island. (This was in 1885.) Indicating in his evidence (Rec., 355) where Smale's Point was, he spoke of that point being connected by a corduroy road, with an elevation of land to the west and south called at the trial "Island." This was a different elevation from the one called "Elm Island," the latter being farther south.

An allusion in the brief of the learned counsel (p. 52) to Mr. F. C. Rossiter, one of the surveyors who testified at the hearing, should not be treated as a damaging criticism. It should have been remembered as to him, that he was a witness for the defendant in error (Rec., 369-371), called to show examinations and surveys as to the ridge and the depressions south of it. In explaining them at the hearing, he stated the depth of soil placed upon the corduroy road constructed in the depression south of south-west fractional quarter of Section 20, and he also showed measurements by him in 1883 as to land in the tongues, or so-called "Ridge," south of that tract; the estimate being of 4½ acres in the western tongue and 10.26 acres in the eastern tongue. (Rec., 370.) He found water in the natural depression. (Rec., 371.)

While the witness testified of the acreage of tongues or elevated lands connected with south-west fractional quarter of Section 20 in 1883, it does not follow that there was such acreage in 1834, nor that the correctness of the meander in 1834 and 1835 is impeached. The govern-

ment plat of the survey shows how the surveyor found the lake at those dates.

It is an error to suppose, as is intimated in the brief of the learned counsel at page 41, that there has been a finding that "Hyde Lake had originally been a separate body of water." Nor does the qualification added by counsel, "or had became such * * * prior to the suit," put the matter in good form.

The suggestion, on the same page, that there have been findings in this case of "the water in 1834-5 * * * at 2.2 feet above datum," is quite at fault. A statement in the opinion by Mr. Justice PHILLIPS (p. 467 of record in this case) that "the level of the waters of Wolf Lake when the same reach about the meandered line of the original survey would be about 2.2 feet above datum" may have seemed to the counsel to favor his suggestion. *Non constat,* however, this height of water may have been much greater. That the waters were much higher when the original surveys were made appears from the field notes as explained by the surveyors who testified at the hearing of this case. (See former brief for plaintiffs in error, pp. 34-36.) Much higher elevations of water, at periods after 1874, are shown by the evidence. (*ibid.,* 38-47.)

It should be remembered, too, that in the contest in the land office it was found (Rec., 94) that the water had permanently receded prior to the second survey, which was in 1874, and that there was "a failure to show that the plat of the survey did not correctly represent the boundaries of the land in 1850."

Why was the latter date stated in the opinion of the Commissioner of the General Land Office? It was be-

cause the State of Illinois claimed under the grant by the Swamp Land Act of September 28, 1850, and the Illinois Central Railroad claimed under the Land Grant of September 20, 1850. (*Ib.*) The claims were not considered as predicable with reference to land which had become unsubmerged in later years. (*Ib.*)

The learned counsel suggests (p. 45 of his brief), that Judge Tuley found the center of the lake to be in Indiana, a little east of the state line of Illinois. His opinion shows that a division of the original "Navigable Lake" by a north and south line would show the middle or center line to be near, but east, of the state line. (Opinion following brief for plaintiffs in error, p. 216.)

It is said by the learned counsel (p. 44 of his brief) that the "defendant in error in fact takes no more land by the decree upon the accretion basis than he would have taken if the title to the submerged lands had been held to have passed under the patents."

If he would take as much in following the decision which this court made in *Hardin* v. *Jordan,* should he object to that decision?

But he does undoubtedly get very much more under the decree which the Supreme Court of this state affirmed than he could get upon the principle of attaching to his upland as patented a proportionate part of the lake bed; and he gets it at the expense of the plaintiffs in error. Hence, their request to look into the basis of the decree.

The claim of title by the defendant in error as coming through the state, and on the theory of accretions, is violative of rules of property. It ignores the fact that the United States had full proprietary title when the lands were brought into market, and never parted therewith ex-

cept by the patents. It treats the meander of the lake as having had magical power, a power to transform the lake from its innavigability in fact to a supposed equality with Lake Michigan; forgetting that in the case of the latter lake the rights of navigation control, while with this evaporating and evanescent sheet navigation had nothing to do.

VIII.

Conclusion.

The present record was made up as per stipulation, and has embodied in it the evidence as to physical conditions and other matters which the counsel desired to have before the court. Much of the evidence for the second patentees thus remains in the record; all, indeed, as to physical conditions. Of course, this was for the purpose of enabling the court to pass upon the main question as to the title or rights of patentees under the patents; and, of course, upon the incidental question whether the state took title because of the meander. The record raises the general question how patents for land bordering on a non-navigable lake should be construed as to title to the lands submerged at the time of the government survey.

It is hoped that enough is shown to enable the court to direct a decree, which it is believed will be more just in its provisions, because conformable to the common law, and more faithful to public interests and the maintenance of law and equity.

Respectfully submitted.

Thomas Dent,
For Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. 56.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY, PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

ADDITIONAL SUGGESTIONS FOR THE PLAINTIFFS IN ERROR.

I.

THE RADICAL ERROR OF THE SUPREME COURT OF ILLINOIS IN DETERMINING AS MATTER OF LAW THAT THE MEANDER OF THE LAKE, RECOGNIZED AND FOUND BY THAT COURT TO BE A NON-NAVIGABLE LAKE, VESTED TITLE IN THE STATE, VITIATES THE JUDGMENT AND THROWS OPEN TO CONSIDERATION THE STATE OF THE RECORD BEARING UPON THE QUESTION OF APPROPRIATION OR APPORTIONMENT AS BETWEEN THE PARTIES.

Upon this question the rule stated in *Green vs. Lessee of Neal*, 6 Peters, 291, 298, is to be maintained; for, as was there said:

> "On all questions arising under the Constitution and laws of the Union, this court may exercise a revising power; and its decisions are final and obligatory on all the tribunals, State as well as Federal. A State tribunal has a right to examine any such questions, and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised."

The writ of error in the present case being for the reversal of an erroneous judgment, a judgment which was erroneous because the court below denied the claim of the plaintiffs in error as to the ownership under the Government patents of any part of the lake bed or submerged lands, the case is subject to revision here, because the denial was based upon a question of law, and the revision may come likewise if the decision was based partly upon a question of fact, the finding of which was from or with reference to a disregard of the rights acquired under the patents; LYTLE *vs.* ARKANSAS, 22 Howard, 193.

The question whether the running of a meander line by the surveyor amounted to a surrender, or offer of surrender of the lake, segregating it from the public domain, was a question of law. All the questions of fact connected with it in any manner, including the fact that the meander on the north side of the lake was twice run, and the fact that the line itself was not shown on the plat nor marked on the ground by any monuments, only the general course of the lake being thereby shown with reference to enabling the Commissioner of the General Land Office to estimate the area or acreage of fractions bordering on the lake, can be taken into consideration by the court in determining what is the law of the case as to apportionment between proprie-

tors who purchased from the United States tracts having the lake as a boundary.

There comes in a principle stated in *Dower vs. Richards*, 151 U. S., 659:

> "When" (in a claim of right under the Constitution and laws of the United States) "the question decided" (in denial of such claim) "is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency or legal effect of the evidence as bearing upon a question of Federal law, the decision may be reversed by this court."

Also, as was held in *Republican River Bridge Company vs. Kansas Pacific Railway Company*, 92 United States, 315, 317:

> "Where a right is set up under an act of Congress in a State court any matter of law found in the record, decided by the highest court of the State, bearing on the right so set up under the act of Congress, can be re-examined here" (*Id.*, 216).

Such findings as may be supposed to have been made in the State court proceeded upon the application of an erroneous view of the law, and may therefore be reversed and set aside by this court.

This remark applies especially to all that succeeded the declination of the supreme court of the State of Illinois to—

> "hold (that) the grant to a riparian owner conveys the bed of a non-navigable lake, and makes its waters mere private waters" (Record, 481).

The holding of that court, in addition, was that as to any meandered lake, irrespective of size—

> "The State exercises control, and holds the same in trust for all the people, who alike have benefit thereof in fishing, boating, and the like" (*Id.*).

The court thus likened all non-navigable lakes or ponds, when any of the same happen to be meandered in the public surveys, to navigable waters or any great inland sea, like Lake Michigan, for example, and would entirely obliterate, as to meandered lakes, the distinction between navigable or public waters and those which are non-navigable or private. In adopting such a novel declaration with regard to the deputy surveyor's act of running a meander line, the supreme court of Illinois was not consistent with itself; for it expressly recognized various prior decisions of its own, beginning with *Middleton vs. Pritchard*, 3 Scam., 510, putting an entirely different construction upon the purpose and effect of a meander line (Record, 473-'4; opinion by Mr. Justice Phillips). In making that declaration, too, the court omitted to recognize the fact that the police power of the State is as extensive in reference to private waters as it is in respect to public waters, so far as the interests of the public have any real and practical concern therewith; which principle was recognized by the circuit court of Cook county (Record. 424,) in its decree as first rendered, intended to follow, in substance at least, the decision of this court in *Hardin vs. Jordan*, 140 U. S., 371, and *Mitchell vs. Smale, Id.*, 406.

II.

THE APPLICATION OF JUST PRINCIPLES REQUIRES A CONSIDERATION OF THE LAW AND OF THE FACTS IN THE RECORD BEARING THEREON AS TO THE EXTENT OF THE RIGHTS OF THE APPELLANTS IN RESPECT TO THE CONSTRUCTION AND EFFECT OF THE PATENTS THROUGH WHICH THEY CLAIM AND HOLD TITLE.

Here it may be contended adversely that some force or effect should be given to the findings upon which the first decree was based. To this it may be answered that while the supreme court of the State did not in express terms ob-

ject to such findings as were embodied in the decree, yet it did reverse the decree, and therefore such findings have no present force or effect, and are not binding upon any court. Again, the findings by or under each decree were a departure from the pleadings as between the parties to the present record (Record, 26, 50). On the side of the plaintiffs in error the pleadings made reference to what had sometimes been claimed to be a narrow spur or promontory of land, said to extend in a southwesterly direction from what is shown on the plat as S. W. fractional ¼ of section 20. In describing the ridge as it existed at the time of the commencement of this suit, it was stated that at certain stages of water it extended half way across the space shown on the plat as covered by the lake towards the point of land comprising the east fraction of S. E. ¼ of section 30 and fractional section 29, as shown by the plat, with the exception that about half way down the extent of said spur of land stretching from said section 20, as aforesaid, there was an opening or space through which the water passed at ordinary stages, etc. (Record, 26), and in the answer of the defendant in error the allegations in this regard were admitted (Record, 50).

It is apparent, therefore, that there was upon the pleadings an admission differentiating the case as to this supposed spur from the decree as first rendered, and also in a more marked manner differentiating it from the opinion of the supreme court of the State, which was intended to be carried out by the decree finally rendered.

The admitted facts upon the record will authorize this court to act independently of the inconsistent findings intended to carry out what must be recognized as an erroneous view of the law.

Besides this, if we bring under consideration the decree of August 10, 1892 (Record, 416–424), and look into the opinions of his honor, Judge Tuley, which by stipulation with counsel for the defendant in error have been shown in appendices to the brief of plaintiffs in error (pp. 189–219),

we shall find that his honor did not base his findings upon actual evidence as to the condition of the lake as to land and water at the time of the survey of 1834–'5. (See his opinion at page 200, brief of plaintiffs in error.) But he based his decree more upon what he regarded as a fact from the special findings of Mr. Justice Gresham, which were as of the time of the decision made by that learned judge, namely, in 1885 (*Id.*, 199). Those findings are not, however, in the present record.

While Judge Tuley thought there was some land inside of the meander line in S. W. ¼ of section 20 and in fractional section 29, at the time of the survey of 1835;

yet he found it to be

> " impossible from the evidence to ascertain the exact quantity of such land " (*Id.*, 200).

He further found that the survey of 1834–'5 was to be adjudged from the evidence to have been

> " made in good faith."

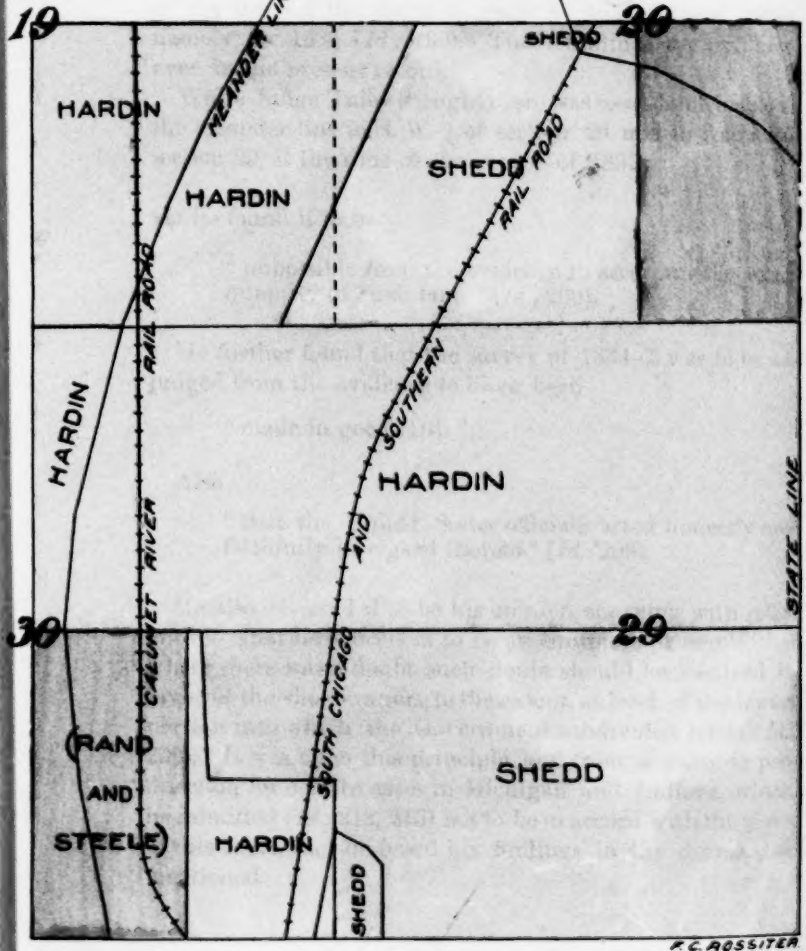
Also

> " that the United States officials acted honestly and faithfully in regard thereto " (*Id.*, 200).

He also declared it to be his opinion, speaking with reference to what he conceived to be an equitable principle, that where there was a doubt such doubt should be resolved in favor of the shore-owners, to the extent, at least, of the lowest portion into which the Government subdivided lands (*Id.*, 200). It was upon this principle, and from a seeming predilection for certain cases in Michigan and Indiana, which he admitted (*Id.*, 212, 213) not to be in accord with the views of this court, that he based his findings in the decree just mentioned.

MAP

SHOWING APPROXIMATELY THE
LINES OF DIVISION OF LAKE BED UNDER
THE DECREE OF AUG. 10, 1892.



The map shown herein represents approximately the lines of division under that decree. We say "approximately," because the diagonal line between the pink and the buff parcels in sections 19 and 20 were to be fixed by survey or measurement, it being intended to divide the bay by running a line half way between the meander line in section 19 on the west and S. W. fractional ¼ of section 20, when so extended southward as to give its eastern line the full length of a regular quarter section, making an equal division of that part of the bay. Approximate is also the appropriate word as to the division line drawn between the pink and buff in section 30, as showing the division of the bay upon that part of the plat, the true line intended being subject to survey or measurement in making a division. Nor does this plat represent separately the strip of 400 feet in breadth, north and south, on the south side of sections 19 and 20, then awarded up to such dividing line to the Cook County Canal and Dock Co. The plat is intended to represent approximately the general lines of division as between defendant in error Shedd, on one hand, and the plaintiffs in error, on the other hand, by the decree first rendered, the tracts of the plaintiffs in error being combined as all one and the same.

In speaking above of the admissions upon the pleadings we should also have noted that those admissions applied measurably to the allegations of plaintiffs in error as to stages of water under which any supposed spurs or promontories would be submerged (Record, 25). As to fractional section 29, as well as with reference to fractional S. W. ¼ of section 20, it was alleged that if an area could be supposed to have been unsubmerged at times, yet it was entirely insufficient to warrant the cost of meandering and estimating it at the price of Government land, namely, $1.25 per acre (Record, 26), and this is one of the allegations admitted (Record, 50). The intermediate space was also alleged to be thoroughly saturated with water, marshy and utterly

unfit for cultivation, and subject to continuous overflow (Record, 25, 26); also it was averred that when such intermediate space was partly unsubmerged it took the form of islands (Record, 27).

Two of such islands are recognized in the final decree (Record, 447). The 67th paragraph of that decree says:

> "In the marshy depressions" between points of extension from the north and south respectively "into the lake were two islands, one a mere knoll, the other containing about one or two acres, and on which trees and bushes grew" (*Id.*).

And quite inconsistently with the general theory of giving accretions, the court, on that supposed state of facts, decreed that those

> "islands passed under said patent of fractional section 29 to the grantee therein, and had vested in petitioner Shedd" (*Id.*).

In what has been said above, it has not been intended to supersede or weaken the force of the suggestions made in the original brief of the plaintiffs in error (pp. 150–186), although a part of the matter contained therein has been herein reiterated or, in a measure, restated. It has been more especially the purpose of these suggestions to save an unnecessary consumption of time in oral argument.

It seems to be proper to add in this connection that the claim by the plaintiffs in error of extension of the patented tracts over a proportionate share of the lake to the center has been constantly made by them in all parts of the litigation.

It was made by the pleadings prior to the decision of this court in *Hardin vs. Jordan*, 140 U. S., 371, and was repeated thereafter in language similar to that of this court.

It will be borne in mind that this court there said:

> "It has been the practice of the Government from its origin in disposing of the public lands to measure

> the price to be paid for them by the quantity of upland granted, no charge being made for the lands in the bed of the stream, or other body of water. * * * The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title in the grantee to such meander lines." * * *

In affirming the second or last decree the supreme court of the State approved of such definition of the object and character of the meander; for in that decree, which the court approved (Record, 487) as being in conformity with the instructions given in its former opinion, it was expressly declared that the meander was—

> " for the purpose of ascertaining the quantity of upland of the surrounding tracts to be charged for to the respective purchasers, and not for the purpose of limiting the respective grants and conveyances to such purchasers to the meander lines (so called) of said survey; the waters of the lake constituting and being the boundaries of such grants " (Record, 439).

The constant claim of the plaintiffs in error from the beginning has been that the patents gave them not only, as the supreme court of Illinois would allow, a mere riparian right or privilege, but such proprietary right or interest as the United States had in respect to the submerged land or body of the lake itself at the time of the original survey; the respective patentees taking proportionately to frontage on the lake according to the plat of the survey. This claim was stated over and over again in the pleadings (Record, 15, 17, 18, 19, 20). It was made in the case of *Hardin vs. Jordan, supra*, a transcript of the judgment in which by the circuit court of the United States for the northern district of Illinois after the remand from this court was offered and received in evidence by the circuit court of Cook county (Record, 251). It was also made in

the offer of the transcript of the judgment of the United States circuit court finally rendered in the same case (Record, 433). It was by the supreme court of the State, in its opinion by Mr. Justice Phillips, recognized as a claim made both by the plaintiffs in error and the defendant in error (Record, 481). It was made again in the assignment of errors, when the case had to be taken to the supreme court of the State by the plaintiffs in error, it being alleged therein—

> "that the court erred in holding that the title to any of the lands, whether submerged or unsubmerged, was in the State of Illinois, and in refusing to give due effect to the patents through which appellants respectively deraigned title" (Record, 454).

That the survey of 1834–'5 was accurate, and therefore that the plat under which the respective grants were made should govern, appears, among other things, from the fact that all section lines were run to the lake, and that corners thereof were established at the margin of the lake (Record, 312); also from the fact that the half-section lines, which, of course, were projected in the General Land Office in the making of the plat, were found from the evidence to have reached the lake (Record, 311, 312). This would go to show that the contours of fractional section 29 and of fractional S. W. ¼ of section 20 were correctly represented on the plat. This would appear also from observing the evidence as to elevations shown on Shedd's Exhibit C (Record, 91). Comparatively few figures of elevations between the meander line on the north and the east portion of the S. E. ¼ of section 30 or fractional section 29 (the latter tracts having the same extension northward to the lake in the Government survey) show elevations which would not have been covered at stages of water shown even in the later years to have been somewhat frequent.

The defendant in error took pains in introducing testi-

mony to show the supposed area on the 26th of February, 1883, of the land which the surveyor, Mr. F. C. Rossiter, thought to attach to or be connected with S. W. fractional ¼ of section 20. Such surveyor spoke of land projecting from the original 4.53 acres in the way of tongues. In one of these he said there were 4½ acres, and in the other one 10.26 acres, the 4½ acres being in the W. tongue, or supposed ridge, and the 10.26 acres in the E. one (Record, 370). But the surveyor also testified that in an examination made by him November 14, 1891, he found a depression or break in the ridge a few hundred feet south of Smale's house (Record, 369). (This is shown as the Condit house, Record, 173.) In explaining about such depression, the surveyor said that a corduroy road had been made there prior to the date last mentioned, at the east end of the depression; and he gave the elevations on the corduroy road at 2.49 and north of the corduroy road 2.3, and on the corduroy road 2.34 above datum; and as to

> "the general course of the depression there through that ridge,"

he said:

> "The direction is nearly north and south, bearing a little to the southwest and northeast."

He also answered that water at about 2½ feet would pass through there (Record, 370). The same witness said that in his survey of February 26, 1883, there was water in this natural depression (Record, 370, 371). These accounts from the surveyor called by Mr. Shedd in this regard were confirmed by Mr. Shedd in his own testimony, in which he entered into somewhat further particulars (Record, 72, 73). He explained, with reference to map "C" (Record, 91), the location of the natural depression. He did not claim that fractional section 29 extended much more than 600 or 800 feet

north of the south line of the section; *thus confirming the correctness of the original survey* (Record, 73).

He said in respect to the ridge, speaking of the time when he first saw the land, that—

> "In extreme high water I think that about all of that ridge would be covered by water. I have seen water there so high that I think very little of it would show out of the water. * * * I did not go on it at that time. I don't think it would have been possible to get there except by boat, but in ordinary stages of high water I should say that the whitest portion as indicated on the map (Shedd's Exhibit C, Record, 91) was probably above water" (Record, 73).

He was evidently here speaking of his early acquaintance with the property.

III.

THE SUGGESTIONS BY THE SUPREME COURT OF THE STATE SUPPOSED TO BE SUBJECT TO BE TREATED AS FINDINGS ANSWER THEMSELVES AS NOT BEING REALLY INDICATIVE OF THE STATE OF THINGS AT THE TIME OF THE ORIGINAL SURVEY.

In the opinion by Mr. Justice Phillips there is a statement that—

> "At different seasons of the year, as early as 1841, the ridge was often above the level of the lake, and in the course of a few years the ridge materially increased in width and was above the level of the water at ordinary stages" (Record, 464).

This was in recognition of the fact that there had been a change of conditions. The learned justice also said that—

> "between fractional section 29 and fractional S. W. ¼ of section 20 owned by Shedd, as shown by the evidence, there existed at the time of the original survey *a ridge which was but slightly covered by water*, and at several points along this ridge islets existed, one having trees thereon" (Record, 464).

IV.

LOOKING TO THE PATENTS, THE PLAT, THE ADMISSIONS UPON THE PLEADINGS, AND THE EXPLANATIONS GIVEN BY HIS HONOR MR. JUSTICE PHILLIPS, THIS COURT WILL BE AT LIBERTY TO CORRECT THE ERRORS OF FACT ARISING FROM THE DISREGARD BY THE STATE COURT OF THE ASSERTED RIGHTS OF THE PLAINTIFFS IN ERROR IN RESPECT TO WHAT WAS CONNECTED WITH, AND A PART OF, THE PATENTED TRACTS.

The findings in the first decree, although intended in the main to conform to the opinions of this court, in *Hardin vs. Jordan* and *Mitchell vs. Smale, supra*, did not actually carry out the law laid down by this court, and hence they should not stand.

There is a strangeness, a singularity almost inexplicable, in the position of the supreme court of Illinois. From *Middleton vs. Pritchard*, 3 Scam., 510, and *Canal Trustees vs. Haven*, 5 Gilman, 548, down to this day that court has, without variableness or shadow of turning, stated correct views of the purpose of a meander of a body of water except in the present instance, and correct views as to the effect of a deed conveying property on a highway or a body of water in which the grantor has had ownership. As to the title to land under its great rivers, which are of vastly greater consequence than any or all of its inland non-navigable lakes, it has adhered to the common law, resigning to private ownership the soil of the Mississippi, the Illinois, the Calumet, the Chicago, and other meandered rivers, and has deemed that to be the best policy, as the court has sometimes directly stated, as in *Braxon vs. Bressler*, 64 Ill., 488, as an example, and this although the neighboring State of Iowa has adopted and adhered to a different principle as to navigable rivers. The policy of the State under the grant to it of swamp and overflowed lands was distinctly to turn them over to private

ownership through sales by the respective counties, and this would have disposed of the bed of this comparatively insignificant lake if the claim thereto by the State, as made after the survey of 1874, had prevailed; yet all at once, without any intervention herein by the State itself, the court signified "that the policy of the State in recent years has been to stock its waters, both lakes and streams, with fish" (Record, 478), and then, reluctating (!) against any prospect of "small non-navigable lakes" becoming private waters (*Id.*), the court expressed itself to the effect that it had laid down a reasonable rule in *Trustees of Schools vs. Schroll*, 120 Ill., 509, not stopping to consider that while such waters were private and a part of the public domain, it was for the General Government and not for the State to lay down in regard thereto any such rule; nor staying to consider whether it would be conscientious for the State to claim property never granted to it, nor whether this court had ever consented to yield its power to determine the effect of grants of the public domain under the acts of Congress, nor did the court stop to consider the fact, explicitly stated by this court, that *Trustees of Schools vs. Schroll, supra*, was anomalous and announced a doctrine not necessary to be decided or passed upon in the case.

The earlier cases of *Beckman vs. Kreamer*, 43 Ill., 447, and *Bristol vs. County of Carroll*, 95 Ill., 84, recognized the principle that inland non-navigable lakes were on the same footing in respect to the construction of deeds conveying lands bounded thereby that has always been applied as to rivers in Illinois, and can be construed as proclaiming the law on the subject with more significance than can rightfully be asserted in regard to *Trustees of Schools vs. Schroll, supra*.

Respectfully submitted.

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For Plaintiffs in Error.